

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DIRK EDMOND,

Plaintiff,

v.

MICHAEL J. ASTRUE,

Commissioner of Social Security,

Defendant.

NO. CV 07-2240 AGR

MEMORANDUM OPINION AND
ORDER

Dirk Edmond filed this action on April 10, 2007. Pursuant to 28 U.S.C. § 636(c), the parties consented to proceed before Magistrate Judge Rosenberg on May 21 and 22, 2007. On January 8, 2008, the parties filed a Joint Stipulation (“JS”) that addressed the disputed issues. The Court has taken the matter under submission without oral argument.

Having reviewed the entire file, the Court remands for further proceedings consistent with this Opinion.

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PROCEDURAL BACKGROUND

On June 28, 2002, Edmond filed applications for disability insurance and supplemental security income benefits. A.R. 15. The applications were denied initially and upon reconsideration. A.R. 33-34. Edmond requested a hearing. A.R. 45. The Administrative Law Judge (“ALJ”) conducted a hearing on November 24, 2003, at which Edmond and a vocational expert (“VE”) testified. A.R. 323-355. On June 24, 2004, the ALJ issued a decision denying benefits. A.R. 12-19. On July 27, 2004, Edmond filed a request for review of the ALJ’s decision. A.R. 11. On May 24, 2005, the Appeals Council denied Edmond’s request for review. A.R. 5-8.

This lawsuit followed.

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STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court reviews the Commissioner's decision to deny benefits. The decision will be disturbed only if it is not supported by substantial evidence, or if it is based upon the application of improper legal standards. *Moncada v. Chater*, 60 F.3d 521, 523 (9th Cir. 1995); *Drouin v. Sullivan*, 966 F.2d 1255, 1257 (9th Cir. 1992).

“Substantial evidence” means “more than a mere scintilla but less than a preponderance – it is such relevant evidence that a reasonable mind might accept as adequate to support the conclusion.” *Moncada*, 60 F.3d at 523. In determining whether substantial evidence exists to support the Commissioner’s decision, the Court examines the administrative record as a whole, considering adverse as well as supporting evidence. *Drouin*, 966 F.2d at 1257. When the evidence is susceptible to more than one rational interpretation, the Court must defer to the Commissioner’s decision. *Moncada*, 60 F.3d at 523.

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DISCUSSION

A. Definition of Disability

“A person qualifies as disabled, and thereby eligible for such benefits, only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy.” *Barnhart v. Thomas*, 540 U.S. 20, 21-22, 124 S. Ct. 376, 157 L. Ed. 2d 333 (2003) (citation and internal quotation marks omitted).

B. The ALJ's Findings

The ALJ found that Edmond had the following severe impairment: depression. A.R. 19. Edmond had the residual functional capacity to "sit, stand, and walk for up to six hours each day, with appropriate breaks. He has no lifting limitations. He is capable of performing simple, repetitive tasks." *Id.* Based on his residual functional capacity, the ALJ found that Edmond could perform his past relevant work as a bagger, delivery driver, ramp agent (baggage handler) and stock clerk. *Id.*

C. Mental Residual Functional Capacity

1. Dr. Maloff

Edmond completed high school and one year of college.¹ A.R. 16. His past work included experience as a bagger, delivery driver, baggage handler, and stock clerk. *Id.* On October 14, 2000, he injured his head at work, and has not worked since. *Id.*

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¹ A medical report indicated Edmond had completed 2.5 years of community college. A.R. 169. Edmond's own report indicated completion of only one year of college. A.R. 59.

1 The only mental limitation the ALJ imposed was that Edmond was capable
2 of performing only simple, repetitive tasks. A.R. 17, 19. The ALJ cited to the
3 report of Barbara Gayle, a State agency psychologist who examined Edmond on
4 March 5, 2002. A.R. 17. Dr. Gayle administered the following tests: Wechsler
5 Adult Intelligence Scale, Wechsler Memory Scale III, Memory for Design, Trails
6 Making Test, and Bender-Gestalt. A.R. 168. Edmond reported to Dr. Gayle that
7 he had problems with concentration and memory. A.R. 169. In her mental status
8 exam, Dr. Gayle noted that Edmond was able to follow instructions, although his
9 response time was “slightly slow” and “[h]is effort appeared to vary.” A.R. 170.
10 Based on the Comprehension subtest of the WAIS-III, she found Edmond’s ability
11 “to identify and solve problems falls in the impaired range.” *Id.* Edmond’s verbal
12 IQ was 69, which is in the mild mentally retarded range; his performance IQ was
13 73, which is “borderline”; and his full scale IQ was 68, also in the mild mentally
14 retarded range. A.R. 171. However, she noted that the IQ scores were “a
15 minimal estimate of the claimant’s current cognitive functioning, as they are
16 inconsistent with expressive and receptive language skills. However, the
17 claimant may have lost some points due to time constraints.” *Id.* Dr. Gayle also
18 found Edmond’s mood to be “despondent.” A.R. 170. She diagnosed him with
19 depression. A.R. 172.

20 Dr. Gayle found Edmond’s “immediate memory” to be sufficient to “focus
21 on questions and follow simple instructions.” A.R. 171. Similarly, she found his
22 concentration sufficient to be able to “focus on questions and follow simple
23 instructions.” *Id.* Dr. Gayle concluded that Edmond “has adequate cognitive
24 ability to understand, remember and implement simple to mildly complex tasks.”
25 A.R. 172.

26 Edmond challenges the mental RFC adopted by the ALJ. More
27 specifically, Edmond argues that the ALJ failed to comply with the legal standard
28 in rejecting the opinion of treating psychiatrist Perry Maloff, which would have

1 resulted in significantly more restrictive mental limitations. JS 3-4. An opinion of
2 a treating physician is given more weight than the opinion of non-treating
3 physicians. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). When a treating
4 physician's opinion is contradicted by another doctor, "the ALJ may not reject th[e
5 treating physician's] opinion without providing specific and legitimate reasons
6 supported by substantial evidence in the record. This can be done by setting out
7 a detailed and thorough summary of the facts and conflicting clinical evidence,
8 stating his interpretation thereof, and making findings." *Id.* at 632 (citations and
9 internal quotation marks omitted).

10 Dr. Maloff, a psychiatrist, treated Edmond first on February 26, 2003, in
11 connection with his workplace injury. A.R. 214. Based on a mental status exam,
12 Dr. Maloff found that Edmond's calculations and remote memory were poor. A.R.
13 215. He diagnosed him with "personality change secondary to general medical
14 condition (closed head trauma)." A.R. 216. Dr. Maloff said that Edmond should
15 begin individual psychotherapy with Dr. Karman, prescribed Effexor, and should
16 remain under the care of Dr. Schweller. *Id.* Edmond had individual
17 psychotherapy with Dr. Karman, a psychologist, on March 7, 20, and 31, 2003.
18 A.R. 220.

19 Dr. Maloff saw Edmond again on April 2, 2003. A.R. 218. He said
20 Edmond's condition had "not improved significantly." *Id.* He noted that Edmond's
21 speech was "hesitant" and his memory "poor." Edmond had further individual
22 psychotherapy with Dr. Karman on April 17, April 28, May 5, and May 16, 2003.
23 A.R. 221, 224. Dr. Maloff saw Edmond again on July 16, 2003. A.R. 225. He
24 again indicated that Edmond's condition had not improved significantly. *Id.* He
25 noted that his demeanor was "childlike" and there were long periods of time
26 between questions and answers. *Id.* Dr. Maloff saw Edmond again on August
27 15, 2003. A.R. 271. He again indicated that Edmond's condition had not
28 improved significantly. *Id.* He noted that his affect was childish. *Id.*

1 Dr. Maloff examined Edmond again on September 22 and November 15,
 2 2003, and wrote a comprehensive psychiatric evaluation. A.R. 278. Dr. Maloff
 3 found Edmond's psychiatric condition to be permanent and stationary.² Part of
 4 the input to Dr. Maloff's report was Dr. Karman's psychological testing.³ A.R.
 5 281. Although Dr. Maloff reviewed the test results, "[t]he opinion and
 6 conclusions" were Dr. Maloff's. A.R. 281. In addition to the results obtained by
 7 Dr. Karman, Dr. Maloff reviewed other medical records and reports, including
 8 those of Dr. Liegler⁴ and Dr. Feldman.⁵ A.R. 287-294.

9 Based on a mental status exam, Dr. Maloff found Edmond had long pauses
 10 between questions and answers, most of his responses were only one or two
 11 words, he had trouble identifying the hands of a watch, he heard voices, his mood
 12 was depressed, his affect flat and regressed, and his capacity for insight and
 13 good judgment was poor. A.R. 296-97. Although Dr. Maloff concluded that
 14 Edmond exaggerated his complaints on the MMPI-2, he did so as a "cry for help,"
 15 and the test results were nonetheless valid. A.R. 300. Dr. Maloff found that
 16 Edmund was not a malingeringer. *Id.* He found Edmund had demonstrated

17 2 In the workers' compensation context, "[p]ermanent and stationary
 18 status' is the point when the employee has reached maximal medical
 19 improvement, meaning his or her condition is well stabilized, and unlikely to
 20 change substantially in the next year with or without medical treatment." *Zenith*
Ins. Co. v. Workers' Comp. Appeals Bd., 159 Cal. App. 4th 483, 488 n.3, 71 Cal.
 21 Rptr. 3d 724 (2008) (citation omitted). "Permanent and stationary status refers to
 22 medical rehabilitation from an injury, not ability to work." *Id.* (citations and internal
 23 quotation marks omitted).

24 3 On September 22, 2003, Dr. Karman had administered the following
 25 tests: MMPI-2, Beck Depression Inventory II, Symptom Checklist 90, Wahler
 26 Physical Symptoms Inventory, Quality of Life Inventory, Stroop Word and Color,
 27 Trails Making Test A & B, and Hooper Visual Organization Test. A.R. 257-258.

28 4 Dr. Donald Liegler examined Edmond on April 3, 2003. A.R. 241. He
 29 concluded that Edmond had "no primary neurologic and no clinical neuro-otologic
 30 factors of disability and none could be expected unless his head injury had been
 31 considerably more severe than it was." A.R. 254.

32 5 Dr. Maloff indicates that Dr. Feldman performed a comprehensive
 33 psychiatric examination on Edmond on June 13, 2003. A.R. 289.

1 "significant mood lability, aggressive behavior, and significant apathy." A.R. 303.

2 He found that Edmond's condition had deteriorated since 2002. *Id.*

3 Dr. Maloff completed a "work function" chart rating Edmund's limitations in
 4 the workplace in eight categories: (1) "comprehend and follow instructions"
 5 (moderate); (2) "perform simple and repetitive tasks" (moderate);⁶ (3) "maintain
 6 work pace" (moderate); (4) "perform complex and varied tasks" (moderate);⁷ (5)
 7 "relate to other people" (moderate); (6) "influence people" (moderate);⁸ (7)
 8 "generalizations, evaluations or decisions" (moderate to severe); and (8) "accept
 9 and carry out responsibility" (moderate to severe).⁹ A.R. 307. The eight
 10 categories used by Dr. Maloff correspond to work functions in the Table for
 11 Rating Psychiatric Disabilities ("Table") found in the 1997 version of the Schedule
 12 for Rating Permanent Disabilities ("Schedule") (available at
 13 <http://www.dir.ca.gov/dwc/PDR1997.pdf>).¹⁰ Schedule at 2-3.

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15 ⁶ Dr. Maloff rated the first two work functions as moderate because of "a
 16 combination of depression and cognitive difficulties which impair his ability to
 17 think, concentrate, and remember." A.R. 303.

18 ⁷ Dr. Maloff rated Work Functions #3 and #4 as moderate because of
 19 "significant apathy, loss of initiative, regressed behavior, and dependence upon
 20 his mother. This is the result of a combination of both depressive symptoms and
 21 apathy associated with closed head trauma. He is very much child-like in his
 22 demeanor. He is not left alone." A.R. 303.

23 ⁸ Dr. Maloff rated Work Functions #5 and #6 as moderate because of "little
 24 initiative. Most of the time, he appears removed, distant, and child-like. At other
 25 times, apparently impulsive, aggressive, and labile. He would have significant
 26 difficult (sic) communicating and interacting with co-workers or persons in
 27 positions of authority. He has lost the ability to be independent in most activities
 28 of daily adult living with the exception of showering and dressing." A.R. 303-304.

29 ⁹ Dr. Maloff rated Work Functions #7 and #8 as moderate to severe
 30 because of "significant apathy, loss of initiative and confidence due to a
 31 combination of cognitive and depressive symptoms. He would have considerable
 32 difficulty demonstrating confidence in his ability to think and act independently."
 33 A.R. 304.

34 ¹⁰ Cal. Labor Code § 4660 "governs how the percentage of permanent
 35 disability is determined." *Zenith*, 159 Cal. App. 4th at 491 (footnote omitted). The
 36 schedule in effect before January 1, 2005, was the 1997 schedule. *Id.* at 492.

1 The Table lists eight work functions, assigns a Work Function Impairment
 2 Value ("WFIV") based on a scale from minimal to severe, and places each work
 3 function in Group I (Work Functions 1-3) or Group II (Work Functions 4-8).
 4 Schedule at 2-3. Each work function, by itself, has the following WFIV (value in
 5 parentheses): (1) "comprehend and follow instructions" (30%); (2) "perform
 6 simple and repetitive tasks" (30%); (3) "maintain work pace" (30%); (4) "perform
 7 complex and varied tasks" (12%); (5) "relate to other people" (29%); (6) "influence
 8 people" (6%); (7) "generalizations, evaluations or decisions" (16%); and (8)
 9 "accept and carry out responsibility" (8%). *Id.*

10 The Schedule also prescribes a method for calculating the overall WFIV,
 11 which, in this instance, is the method expressed in Rating Calculation IV
 12 ("impairments within both Groups I and II") because Edmond was rated as
 13 impaired in all work functions. *Id.* Calculating IV(a) provides a Group I Amount of
 14 60% $(30 + (.5 * (30+30)))$. *Id.* Calculating IV(b) provides a Group II Amount of
 15 37.4% $(29 + (.2 * (12+6+16+8)))$. *Id.* To combine the results of the two groups
 16 under IV(c), the correct formula $[60 + ((.45 - (60/300) * 37.4))]$ yields an
 17 unrounded result of 69.35%. *Id.* Rounding that to the nearest whole rating yields
 18 an overall rating of 70%. See *id.* note 3.

19 The ALJ's sole comment about Dr. Maloff's reports was that he gave "little
 20 evidentiary weight to the analysis of lien-bearing psychiatrist, Perry Malouf (sic),
 21 M.D." A.R. 18. According to the ALJ, Dr. Maloff's "payment is a lien, dependent
 22 upon the favorable outcome of the claimant's worker's (sic) compensation
 23 litigation." A.R. 17-18.

24 The ALJ erred in rejecting Dr. Maloff's findings solely on the basis that Dr.
 25 Maloff submitted a lien for payment. A.R. 18. Edmond challenges this reason for
 26 rejecting a treating physician's report as "inappropriate," and the Commissioner
 27 does not argue to the contrary. JS 4, 7-10; see *Lester v. Chater*, 81 F.3d 821,
 28 832 (9th Cir. 1995) (the ALJ erred in rejecting a physician's reports because they

were “clearly obtained by the claimant’s attorney for the purposes of litigation” and stating that “[t]he purpose for which medical reports are obtained does not provide a legitimate basis for rejecting them”) (internal quotation marks omitted).

The Commissioner argues that this Court may nevertheless affirm because there is substantial evidence in the record to support rejection of Dr. Maloff’s opinion. However, a district court is constrained to review the reasons that the ALJ asserts for his or her decision. *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003). A district court may not affirm the decision based on reasons or grounds that the Commissioner did not invoke in making its decision. *Stout v. Commissioner*, 454 F.3d 1050, 1054 (9th Cir. 2006).

Accordingly, because the ALJ did not articulate specific, legitimate reasons supported by substantial evidence for rejecting Dr. Maloff’s reports (See *Orn*, 495 F.3d at 634), the matter must be remanded for him to evaluate Dr. Maloff’s findings and determine what weight to give them.

Edmond also argues that the ALJ erred in rejecting Dr. Feldman’s treating opinion. JS 5-6. However, Edmond does not establish inconsistency between the ALJ’s RFC and Dr. Feldman’s opinion. See A.R. 293-294. As the ALJ stated, Dr. Feldman noted that Edmond’s “MMPI-2 profile was invalid as a result of the patient either having difficulty understanding the questions, answering questions randomly, or attempting to fake bad.” A.R. 16, 293. Dr. Feldman detected “exaggeration of certain problems.” A.R. 16, 293. “He could be malingering or this could also be evidence of a cry for help.” A.R. 293.

2. Mental Limitation Finding and Hypothetical to VE

Edmond also challenges the ALJ’s finding that Edmond can perform his past relevant work. JS 6. Based on the ALJ’s mental limitation that Edmond could only perform simple, repetitive tasks, the ALJ found that Edmond could perform his past work as a bagger, delivery driver, baggage handler, and stock clerk. A.R. 19. Edmond claims that the jobs of delivery driver, baggage handler,

1 and stock clerk require greater mental ability than reflected in the ALJ's finding.

2 JS 6.

3 The ALJ may rely on testimony a vocational expert gives in response to a
 4 hypothetical that contains "all of the limitations that the ALJ found credible and
 5 supported by substantial evidence in the record." *Bayliss v. Barnhart*, 427 F.3d
 6 1211, 1217-18 (9th Cir. 2005). The ALJ is not required to include limitations that
 7 are not in his findings. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001);
 8 *Osenbrock v. Apfel*, 240 F.3d 1157, 1165 (9th Cir. 2001).

9 Here, the ALJ found that Edmond "is capable of performing simple,
 10 repetitive tasks." A.R. 19. However, the ALJ's hypothetical to the VE asked her
 11 to assume that the claimant "would be limited in that he would be able to
 12 understand simple to mildly complex instructions." A.R. 351. Although the
 13 phrase "simple to mildly complex" may have been derived from Dr. Gayle's
 14 opinion (A.R. 172), the ALJ must in the first instance clarify his RFC assessment,
 15 including whether his RFC assessment means that Edmond is capable of
 16 performing past relevant work that involves General Educational Development
 17 Level 1, Level 2 and/or Level 3, and, if appropriate, take testimony from the VE
 18 based on a hypothetical that is consistent with the RFC assessment.

19 **D. Credibility of Edmond**

20 Edmond also challenges the ALJ's finding that his subjective complaints
 21 were not "totally credible." JS 15; A.R. 19. In light of the remand based on Part
 22 C.1 (Dr. Maloff), the Court need not reach this issue. See Social Security
 23 Ruling¹¹ 96-7p (available at 1996 WL 374186, *4) ("When evaluating the
 24 credibility of an individual's statements, the adjudicator must consider the entire

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26 ¹¹ Social Security rulings do not have the force of law. Nevertheless, they
 27 "constitute Social Security Administration interpretations of the statute it
 28 administers and of its own regulations," and are given deference "unless they are
 plainly erroneous or inconsistent with the Act or regulations." *Han v. Bowen*, 882
 F.2d 1453, 1457 (9th Cir. 1989) (citation and footnotes omitted).

1 case record and give specific reasons for the weight given to the individual's
2 statements.").

3 **IV.**

4 **ORDER**

5 IT IS HEREBY ORDERED that the matter is remanded for further
6 proceedings consistent with this Opinion.

7 IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this
8 Order and the Judgment herein on all parties or their counsel.

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10 DATED: April 22, 2008


11 ALICIA G. ROSENBERG
United States Magistrate Judge

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